October 30, 2018

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, DC 20554

Re: **<u>Notice of Ex Parte in WC Docket No. 13-184</u>**

Madam Secretary:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, I hereby provide notice of an oral *ex parte* conversation on Friday, October 26, 2018 between myself and Nirali Patel in the Chairman's office concerning the amortization restriction for special construction projects in the E-rate program.

On behalf of the SHLB Coalition, I expressed concern to Ms. Patel that the expiration of the suspension of the amortization restriction could jeopardize many upcoming E-rate special construction projects in the FY 2019 E-rate year and thereafter. This letter provides further information about this concern.

Prior to the 2014 *Second E-rate Modernization Order*,[1] USAC had followed a practice that, if non-recurring costs exceeded $500,000, funding of the total amount of such costs would not be approved in a single funding year. Such one-time costs would be funded only if amortized over a minimum of three years. The general principle of amortizing non-recurring costs over three years was announced in the Commission's *Brooklyn Order*[2]; however, the details of implementing the *Brooklyn Order*, including the establishment of the $500,000 threshold amount to trigger the proration requirement, was a procedure established by USAC in consultation with the Commission.

In 2014, in order to expedite the deployment of high-capacity connections to schools and libraries, the Commission suspended the amortization requirement and allowed applicants to request funding for all eligible upfront, non-recurring special construction costs in the first year of an E-rate funded application[3], as long as the most cost-effective solution was selected. The Commission found the concern about high, up-front costs draining the E-rate fund to be "not well-founded."[4] The Commission has been proven correct; E-rate applicants have entered into numerous special construction projects in the past four years and funding the one-time upfront costs did not put a strain on the fund. Indeed, overall E-rate demand last year was less than it was in 2014.

[1] See *Second Report and Order and Order on Reconsideration, Modernizing the E-rate Program for Schools and Libraries*, WC Docket Nos. 13-184, 10-90, released Dec. 19, 2014 (hereinafter "*Second E-rate Modernization Order*").

[2] *Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 15 FCC Rcd 17931 (2000) (Brooklyn Order).

[3] *Id.* at para. 17 (The Commission stated in the *Second E-rate Modernization Order*: "Suspending the amortization requirement will give applicants the flexibility to plan large construction projects knowing they can recover the E-rate supported portion of any non-recurring costs upfront, thus providing greater certainty regarding funding and removing this potential barrier to infrastructure investment.")

[4] See, *id.* at para. 18 ("the concerns described by the Commission in 2000 that caused USAC to institute this restriction have proven to be not well-founded.")

The *Second E-rate Modernization Order* explicitly suspended USAC's practice for only four years, ending with the FY 2018 E-rate year.[5] The expiration of the amortization suspension raises the question of what standard will apply to special construction applications in FY 2019 and thereafter. USAC has not addressed this issue in training materials and sessions for the FY 2019 E-rate funding year, nor has the issue been mentioned in a USAC weekly News Brief.

We are concerned that the amortization requirement for projects with non-recurring costs greater than $500,000 will be reinstated, even though the facts demonstrate that the original reason for adopting the amortization restriction has not occurred. There is no evidence that special construction projects have caused a drain on the E-rate fund, which is borne out by the overall decrease in demand over the four years that the suspension has been in effect.

For the following reasons, the SHLB Coalition asks the Commission to continue to suspend the amortization requirement for special construction applications in FY 2019 and thereafter. First, reinstating the amortization limitation could immediately jeopardize the provision of cost-effective broadband connectivity to many schools and libraries. Numerous large-scale FY 2019 special construction procurements are currently underway. For example, we have been advised that there are at least ten (10) projects under consideration in Texas alone, and SHLB members have informed me of other special construction projects being planned in California, North Carolina, Arizona, Colorado, Nevada and Illinois. Applicants are generally unaware of the possibility that the amortization suspension may not be available in FY 2019. Many have issued Requests for Proposals (RFPs) that presume that no E-rate amortization will be required and that applicants will be able to request funding for the discounted-share of their special construction costs in the first year. If the process reverts to the old amortization practice, we expect that some and perhaps many of these projects will have to cancel their RFPs. Some service providers may be unwilling or unable to bid on these projects because they may not have the arrangements in place to carry these costs. At a minimum, we have been told by service providers that their bid prices will likely have to increase as a result.

In addition to increased project costs, applicants and service providers may face greater risk because E-rate cannot issue multi-year commitments. Even if a special construction application is approved in year 1, applicants must re-apply for approval in Years 2 and 3, during which USAC could deny funding. Although we would hope that such funding requests in years 2 and 3 would receive expedited approval, we are uncertain that this would occur, especially given USAC's previous practices.[6] This risk of non-funding in the out-years of the amortization makes the use of this process highly speculative and unattractive to vendors. If applicants and service providers are discouraged from pursuing special construction projects because the risks are too high, fewer schools and libraries will receive high-speed broadband and Internet services, especially in rural markets.[7]

The reinstatement of the amortization practice also has the potential to adversely impact those projects

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[5] See Id, at para. 19 ("We therefore direct USAC to suspend application of its multi-year amortization policy for funding years 2015 through 2018 and to allow applicants to seek support for upfront or non-recurring charges without imposing any amortization requirements.")

[6] As we have pointed out in earlier correspondence, we continue to be concerned about USAC's lack of consistency in evaluating E-rate applications. See, e.g., the SHLB Coalition's *ex parte* statement in support of the New York City Department of Education appeal, which alleges that USAC mis-interpreted the *Macomb Order* precedent in denying New York City's E-rate application, WC Docket No. 13-184, Sept. 21, 2018.

[7] See *Second E-rate Modernization Order*, para. 19 ("In addition, ALA and other commenters indicate that lack of certainty about the ability to recover costs in future funding years may deter some applicants from investing in large infrastructure projects that will be amortized over future funding years.")

that depend upon state matching funds. We understand that the state matching programs for special construction in Illinois, Texas, Nevada and Arizona will expire in the next year. If a state matching appropriation expires prior to the end of the amortization period, the state matching funds may not be available in the second and third years to help pay for the non-discounted share of the project.[8] If the state match is not available, then applicants also will not be able to receive the additional 10% funding from the E-rate program that is available with the match program. This risk is further exacerbated by the Commission's directive in the *Second E-rate Modernization Order*[9] that any school building that received matching funds would be ineligible to receive additional matching funds from the E-rate program for a period of fifteen (15) years.[10]

For all these reasons, the SHLB Coalition urges the Commission to continue to suspend USAC's amortization practice indefinitely and allow service providers to recoup their special construction costs in the first year as permitted in the *Second E-rate Modernization Order*. Allowing the *Brooklyn Order* amortization requirement to be reinstated would be costly not only to schools and libraries, but also to the fund itself, and would increase the program's complexity at a time when all parties are desperately seeking program simplification.

It would also be extremely helpful for the Commission to clarify this issue as soon as possible, as E-rate applicants are currently in the process of soliciting bids for special construction projects in preparation for filing their E-rate applications early in 2019.

Sincerely,

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[8] For example, please see https://tea.texas.gov/Academics/Learning_Support_and_Programs/Technology_Planning/Classroom_Connectivity/Texas_State_Match_Fund_FAQ/#question5.

[9] *Id.* at ¶ 59.

[10] *See* Letter from Cynthia Schultz, Counsel for Illinois Department of Innovation and Technology, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 13-184 (filed October 19, 2018).